IN THE

Supreme Court of United States

OCTOBER TERM, 1916.

THE ARIZONA COPPER COMPANY, Limited,
Plaintiff in Error,
v.
JOSEPH B. HAMMER,
Defendant in Error.
No. 477.

MOTION TO DISMISS AND TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

MOTION.

Comes now the defendant in error above named and moves this Honorable Court to dismiss the writ of error and appeal herein, upon the following grounds:

(1) For want of jurisdiction in this court to entertain said appeal.

(2) Because no appeal herein was taken or perfected within the time required by law, in that the order allowing the writ of error was on March 4, 1916, and the record herein was not filed in this court until May 9, 1916.

(3) Because the appellant claims as ground for appeal that the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, is in violation of Sections 5 and 7 of Article 18 of the Constitution of Arizona, which claim is unfounded, frivolous and presents no question for the consideration of this court.

(4) Because the appellant claims that the Employers' Liability Law, Chap. 6 of Title 14, Rev. Stat. Arizona, 1913, violates the fourteenth amendment of the Constitution of the United States, which is its sole excuse for this appeal, and which contention is frivolous and without merit, and on other grounds stated in the annexed brief.

That said defendant in error also moves this court to affirm the judgment of the district court upon the following grounds:

(a) On the grounds stated in No. 3 in above motion to dismiss, and on the further grounds, to-wit:

(b) That under the provisions of the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, in the United States District Court for the District of Arizona,

the plaintiff below recovered a judgment against the defendant for a personal injury, and that under the provisions of Sec. 238 of the Judicial Code of the United States the plaintiff in error has prosecuted an appeal from that judgment to this court under the claim that said Employers' Liability Law is in violation of the fourteenth amendment of the Constitution of the United States, which claim is untenable, without merit and is the sole excuse for the invocation of the appellate jurisdiction of this court, which in fact does not involve the construction of said Arizona law, and that only general questions of a non-federal character are presented for review, and no plain error, or error at all, was committed by the court below in trying the case, and that the questions on which the decision of the cause depend are so frivolous as not to require argument, and upon the further grounds stated in the annexed brief, and that it is manifest from the record of this cause that the writ is prosecuted only for delay, which is prejudicial to the rights of the defendant in error, in consequence of which the defendant in error respectfully prays that the judgment below be affirmed with damages as prescribed in Rule 23 of this court upon the affirmance of the judgment herein, and with 12 per cent interest as provided for by Sec. 3161 of said Arizona Statute, and in the event that said affirmance be not granted then defend-

ant in error prays that the cause be transferred for hearing to a summary docket.

Respectfully submitted,

FRANK H. HEREFORD AND
~~FRANK E. CURLEY~~,
Tucson, Arizona,
Attorneys for Defendant in Error.

Sirs:

Please take notice that the foregoing motions will be submitted to the court at the City of Washington, in the District of Columbia, on the 9th day of October, 1916, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Yours truly,

FRANK H. HEREFORD AND
~~FRANK E. CURLEY~~,
Tucson, Arizona,
Attorneys for Defendant in Error.

Dated this .... day of August, 1916.

To W. C. McFarland and H. A. Elliott,
Attorneys for Plaintiff in Error,
Clifton, Arizona.

IN THE

Supreme Court of United States

THE ARIZONA COPPER COMPANY, Limited, *Plaintiff in Error,* v. JOSEPH B. HAMMER, *Defendant in Error.*	No. 477.

MOTION TO DISMISS AND TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

STATEMENT.

This is a motion under Rule VI to dismiss the writ of error and appeal, and to affirm the judgment herein.

The cause is here upon a writ of error directed to the District Court of the United States for the District of Arizona to review a judgment entered in said District Court.

The action was brought by Joseph B. Hammer as the plaintiff in the trial court against the plaintiff in error here, under the Employers' Liability Law, Chapter 6 of Title 14, Revised Statutes of Arizona, 1913, to recover damages for personal injuries received by him at Clifton, Arizona, while in the employ of plaintiff in error as a boiler maker at its smelter on December 28, 1914, and resulted in a judgment in favor of plaintiff below upon a verdict in the sum of $12,166.45

The writ of error was allowed on March 4, 1916, (Transcript 274) and the record filed in this court on May 9, 1916, more than sixty days after allowance of writ.

CONSTITUTION OF ARIZONA.

Sections 4, 5, 6 and 7 of Article 18 of Constitution of Arizona, are as follows:

"Sec. 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

Sec. 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

Sec. 6. The right of action to recover damages for injuries shall never be abrogated, and

the amount recovered shall not be subject to any statutory limitation.

Sec. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an *Employers' Liaiblity Law,* by the terms of which any employer, whether individual, association or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

The Employers' Liability Law, approved May 24, 1912, now known as Chapter 6 of Title 14, Rev. Stat. Ariz., 1913, so far as the same has any bearing on the questions at bar, is as follows:

"Sec. 3153. This chapter is and shall be declared to be an employers' liability law as prescribed in Section 7 of Article XVIII of the state constitution.

3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the state con-

stitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

(1) The operation of steam railroads, electric railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind pro-

pelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any work-

man engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

Point I.

It is obvious that the above statute conforms to the provisions of Sec. 7 of Article 18 of the

Constitution of Arizona, and is not open to the question that it violates the fourteenth amendment of United States Constitution. On such question an appeal was dismissed in case of *Easterling Lumber Company v. Pierce,* 235 U. S. 380, 59 L. ed. 279; *Jeffrey Mfg. Co. v. Blagg,* 235 U. S. 571, 59 L. ed. 364; *Brolan v. United States,* 236 U. S. 216, 59 L. ed. 545.

Point II.

Sec. 5 of Article 18 of Constitution of Arizona has no application to the Employers' Liability Law, but pertains to common law actions for negligence.

Consolidated Arizona Smelting Co. v. Ujack, 139 Pac. (Ariz.) 465.

Point III.

Of course the record was not filed in this court within the time required by law, and whether the court will dismiss for that reason or not is discretionary.

The real excuse for this case being in this court is the claim that the Arizona employers' liability law offends against the fourteenth amendment of the Constitution of the United States, which claim on the slightest inspection is so wholly wanting in merit as to be frivolous, and for that reason this court may decline to take jurisdiction and dismiss the writ of error and appeal, as was done in cases,

Brolan v. United States, 236 U. S. 216;
Goodrich v. Ferris, 214 U. S. 71, 53 L. ed. 914;

Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed, 239;
Easterling Lbr. Co. v. Pierce, 235 U. S. 279;
Vandalia Ry. Co. v. Stillwell, 36 Sup. Ct. 445.

The same character of statute has many times been before this court for consideration, and before so many other courts that all questions as to their constitutionality may now be regarded as well settled, and furnishes no excuse for an appeal to this court on that ground, and that such statutes do not offend against the fourteenth amendment United States Constitution has been many times declared by this court.

Northern Pacific Railway Co. v. Meese, 239 U. S. 614;
Easterling Lumber Co. v. Pierce, 235 U. S. 380, 59 L. ed. 279;
Jeffrey v. Blagg, 235 U. S. 571, 59 L. ed. 364;
Chicago etc. v. McGuire, 219 U. S. 549, 55 L. ed. 328;
Chicago Ind. L. Ry. Co. v. Hacket, 228 U. S. 559, 57 L. ed. 966;
Western Indemnity v. Pillsbury, 151 Pac. (Cal.) 398.

We will brifly consider appellant's assignment of errors, transcript pp. 262-269.

ASSIGNMENT I.

It is plain that the complaint conforms to the Employers' Liability Law, and that the contention that it does not state facts sufficient to constitute a cause of action is without merit. There appears no record of such ruling.

ASSIGNMENT II.

This assignment is without merit, and of which there appears no record.

ASSIGNMENT III.

This assignment of error is likewise without merit, and of which there appears no record.

ASSIGNMENT IV.

It does not appear from the printed record that there was any direct ruling of the court on plaintiff in error's special demurrer No. 6. Even if there had been such ruling it was correct because the doctrine of assumption of risk, by virtue of the provisions of Sec. 7 of Article 18 of the Constitution of Arizona and of the Employers' Liability Law, has been entirely removed, and the employer is rendered liable for an injury caused by an accident due to a condition of such occupation

in a hazardous employment named in the Arizona statute.

Stertz v. Industrial Ins. Co., 158 Pac. (Wash.) 260, pamphlet;
Western Indemnity v. Pillsbury, 151 Pac. (Cal.) 398.

ASSIGNMENT V.

There does not appear to be any direct ruling of the court on plaintiff in error's demurrer No. 9, which in a very general way claims that Sec. 7, Art. 18, Constitution of Arizona and the Arizona Employers' Liability Act, are in violation of fourteenth amendment of United States Constitution. This contention is fully answered under Point III, *supra*, of this brief, and under authorities cited *supra*, and also the following:

Chicago, Rock Island & Pac. Ry. Co. v. Zernecke, 183 U. S. 582;
State v. Clausen, 65 Wash. 156, 117 Pac. 1101;
Western Indemnity v. Pillsbury, 151 Pac. 398.

Because the Employers' Liability Act places no restrictions on the amount of damages recoverable is no valid objection, the injured employee is entitled to recover the amount of damages sustained and nothing more.

Sweet v. Chicago etc. R. Co., 157 Wis. 400, 147 N. W. 1054;
Devine v. Chicago etc., R. Co., 266 Ill. 248, 107 N. E. 595.

ASSIGNED ERROR VI.

We find no record where the court ruled on plaintiff in error's special demurrer No. 10.

Sec. 5 of Article 18 of Constitution of Arizona has no application to the Employers' Liability Act, but pertains to common law actions for negligence.

Consolidated Arizona Smelting Co. v. Ujack, 139 Pac. (Ariz.) 465.

The further statement that the Employers' Liability Act does not conform to Sec. 7 of Art. 18 of Arizona Constitution is frivolous.

The question of contributory negligence is not in this case, because the Arizona law makes the defendant liable without fault. The language of the Arizona Statute, Sec. 3154—

"any employer shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

The question for the jury under the instructions of the court (Transcript p. 212) was whether or not the defendant in error was guilty of negligence, and if he was, did his negligence cause his injury; if it did, he cannot recover. If plain-

tiff below was not guilty of negligence he was entitled to recover whether or not defendant was guilty of negligence, and that question was fully presented to the jury in the court's charge. Under the Arizona law the only question that the court could instruct the jury on was whether or not the plaintiff's injuries were caused by his own negligence and not on the negligence of the defendant because the defendant is liable for an accident due to a condition of such occupation, in such hazardous occupation, without fault. Under the law and the instructions of the court the burden was on the plaintiff below to prove that his injuries were not caused by his own negligence, and the court so instructed the jury.

Under this statute the question of the defendant's negligence is entirely removed, and also the doctrine of comparative negligence is taken out of the statute by virtue of the provisions of Sec. 7 of Art. 18, Arizona Constitution. Under this statute what could be the use of giving a charge on contributory negligence when the defendant is liable without fault, and the only question is, was the plaintiff below guilty of negligence?

"Contributory negligence on the part of plaintiff necessarily assumes negligence on the part of defendant."

> 29 Cyc. 506, citing cases in note 44, and *Hammer v. Railroad Co.*, 128 Ky. 486, 108 S. W. 885;

Lime Co. v. Affleck, 115 Va. 643, 79 S. E. 1054;
Ariz. East. R. Co. v. Bryan, 157 Pac. 380, first column.

ASSIGNED ERROR VII.

The court was correct in sustaining the motion to strike, because the plaintiff in error could not prove that defendant in error was negligent at other times.

Ariz. & N. M. Ry. Co. v. Clark, 207 Fed. 820.

ASSIGNED ERRORS VIII, IX.

The assignments under VIII and IX are frivolous, and are fully answered by what has been said under V and VI, *supra.*

ASSIGNED ERRORS X, XI AND XII.

The errors assigned under X, XI and XII are too general, without merit and are frivolous.

ASSIGNED ERROR XIII.

This assignment is without merit, it was immaterial as to the habits and customs of that witness in stopping the car. The question was, what took place at the time plaintiff below was injured

and not as to habits and customs on other days and times.

29 Cyc. 619;
Missouri, K. & T. Ry. Co. v. Johnson, 48 S. W. 568.

ASSIGNED ERRORS XIV, XV, XVI, XVII.

The assigned errors XIV, XV, XVI and XVII are devoid of any merit and are frivolous.

ASSIGNED ERRORS XVIII, XIX, XX, XXI.

The errors assigned under 18, 19, 20 and 21 present the question of contributory negligence which has already been shown not to be in this case. What has been said under assigned error VI, *supra*, is a complete answer to these assignments.

ASSIGNED ERROR XXII.

The court was correcct in refusing to give the instruction because the statute does not divide negligence up into degrees, or comparative negligence, or contributory negligence, but Sec. 3154 does provide that the employer shall be liable "*in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.*" This phase of the law was fully covered by the charge of the court, in which the jury was told that if

the injuries were caused by the negligence of the plaintiff that he could not recover, and the burden of proving that he did not receive his injuries by his own negligence was on him, and if he failed to so prove that the verdict must be for the defendant. See transcript, p. 212, where this charge was given.

ASSIGNED ERROR XXIII.

This assigned error does not present any question for this court. The remarks of the attorney were within the evidence, and were harmless, and the assignment is really frivolous.

ASSIGNED ERROR XXIV.

There is no merit in this assignment. The evidence was more than sufficient to support the verdict and judgment, and the jury was fully instructed as to the law.

ASSIGNED ERRORS XXV, XXVI, XXVII.

These assignments are entirely without merit and present no question for the consideration of this court.

ASSIGNED ERROR XXVIII.

The court did not err in denying the motion for new trial. The affidavits filed in support of

the motion for new trial were merely cumulative and contradictory of the evidence taken on the trial.

Lowry v. Mt. Adams & Eden Park etc., 68 Fed. 827.

Since, therefore, it appears that no constitutional question is presented and that no plain error is disclosed by the record, and that the character of the case is such as not to require or to be entitled to receive from the court more than a summary inspection and examination of the record, and that such examination and inspection, even if extended to the most searching scrutiny, would inevitably result in a dismissal or affirmance of the judgment below, we respectfully submit that the cause should be dismissed or the judgment of the lower court should be affirmed.

Should these motions be denied, we respectfully submit that this cause is of such a character as not to justify extended argument and that it should be transferred for hearing to the summary docket. Since it clearly appears that this writ is prosecuted only for delay, to the prejudice of the defendant in error, and is in reality frivolous, we respectfully submit that damages should be awarded to defendant in error pursuant to Rule 23 of this court, and that 12 per cent interest be added to the judgment from the time of filing of the complaint herein, November 3, 1915, as pro-

vided for by Sec. 3161, Revised Statutes of Arizona, 1913.

Respectfully submitted,

FRANK H. HEREFORD AND
FRANK E. CURLEY,
Tucson, Arizona,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 477 [redacted] 20

THE ARIZONA COPPER COMPANY, LIMITED,
Plaintiff in Error,

v.

JOSEPH B. HAMMER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

on motion to dismiss and affirm.

JOHN A. GARVER,
W. C. McFARLAND,
Counsel for Plaintiff in Error.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 477.

THE ARIZONA COPPER COMPANY, LIMITED,
Plaintiff in error,

vs.

JOSEPH B. HAMMER,
Defendant in error.

Brief for plaintiff in error, on motion to dismiss and affirm.

Motion by defendant in error to dismiss and affirm, under Rule 6.

Statement.

The action was brought by the defendant in error in the United States District Court for the District of Arizona, to recover damages for personal injuries alleged to have been sustained by him while in the employment of the plaintiff in error. A verdict was rendered in his favor for $12,000.

POINTS.

FIRST.

Questions discussed in the Bray case.

The action was brought under the Employers' Liability Act of Arizona, and the two principal questions involved are the same as those which were raised in the Bray case (No. 478), and which are discussed in the brief submitted on a similar motion, made at the same time, in the Bray case. It will, therefore, be unnecessary to repeat the argument in this case, the Court being respectfully referred to the brief in that case.

SECOND.

The constitutional question duly raised in the lower Court.

It is asserted in the brief in this case for the plaintiff in error (p. 15), that " there does not appear to be any direct ruling of the Court " on the constitutional question raised by the demurrer of the plaintiff in error.

The question was duly raised by demurrer to the complaint (Record, p. 8). The demurrer was overruled, and an exception was duly taken to the ruling (Record, pp. 16, 27).

THIRD.

The motion should be denied.

Washington, October 9, 1916.

JOHN A. GARVER,
W. C. MCFARLAND,
Counsel for plaintiff in error.

In the Supreme Court of the United States

OCTOBER TERM, 1917

The Arizona Copper Company, Limited, Plaintiff in error, vs. **Joseph B. Hammer,** Defendant in error.	No. 161

In Error to the District Court of the United States For the District of Arizona

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BRIEF OF DEFENDANT IN ERROR

L. KEARNEY,
Clifton, Arizona,
FRANK E. CURLEY,
Tucson, Arizona
Attorneys for Defendant in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

The Arizona Copper Company, Limited, Plaintiff in error, vs. **Joseph B. Hammer,** Defendant in error.	No. 161

Brief of Defendant in Error

This action was commenced in the United States District Court for the District of Arizona, at Tucson, under Chapter Six, Title Fourteen, Revised Statutes of Arizona, 1913, known as the "Employers' Liability Law," to recover for injuries received by defendant in error while in the employ of plaintiff in error in the operation of its smelter.

Upon the trial of the case in the District Court at Tucson, before a jury, a verdict was returned in favor of defendant in error for the sum of $12,000.00 upon which judgment was entered and from which this appeal was prosecuted.

The question primarily presented upon this writ of error involves the constitutionality of the Arizona Employers' Liability Law. It is contended that the law under which this action was prosecuted, namely, the Arizona Employers' Liability Law, is invalid for the reasons:

1st. That it is violative of the Constitution of Arizona.

2nd. That it is violative of the Fourteenth Amendment of the Constitution of the United States in that it deprives plaitiff in error of its property without due process of law and denies it the equal protection of the laws of the State of Arizona by subjecting it to the unlimited liability for damages for personal injuries sustined by its employees without fault on the part of the employer.

State Constitution Considered

The validity of this act was, since the prosecution of the writ of error in this case, sustained by the Supreme Court of Arizona in the cases of Superior & Pittsburg Copper Co. vs. Tomich, 19 Ariz., 165 Pac. 1101, and Inspiration Copper Company vs. Mendez, 19 Ariz.————————, 166 Pac. 278, finally determining that question so far as this court is concerned.

This court has, we believe, in the Workmen's Compensation cases (New York Central Railroad Co. vs. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed 667; Hawkins vs. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. ed. 678, and Mountain Timber Company vs. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. ed. 685) decided March 6, 1917, determined every theory advanced in opposition to the law, in favor of its validity.

That "no person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit," many times announced by this court, was reiterated in these cases, as was the further fact that the "fellow servant" doctrine, the "contributory negligence rule" and law relating to the employee's "assumption of risks" are but such common law rules in which a person has no property, no vested interest, and that it is within the power of the legislature to change or entirely repeal them.

It may well be doubted, as observed by this court in the case of New York Central Railroad Co. vs. White (supra) whether in view of vast industrial organization, investment and employment, "the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead." No such question is presented in this case.

The Arizona Employers' Liability Law differs in one material respect from the acts under consideration in the Workmen's Compensation cases. The New York, Iowa and Washington Compensation Acts each comprehend a general scheme of adjusting liabilities be-

tween employer and employee for injuries received form almost every conceivable source, other than farm and domestic employments, from which injury is, in the ordinary course of events, expected to occur. The Arizona Employers' Liability Act does not embrace and was not calculated to embrace any such general plan.

The Arizona Law does not attempt to change the common law rules affecting injuries received in the ordinary course of employment. It was only calculated to extend relief to, and [redacted] provide a remedy for, injuries received in hazards recognized in every-day life, and classified by the legislature in its proper discretion as "inherent in such occupations;" that character of extra-hazardous employment in which it is recognized that the utmost care and precaution cannot wholly avoid injury.

That this was the purpose of the legislature is not left to conjecture. By Paragraph 3155, Revised Statutes of Arizona, 1913, being Section 3 of the Employers' Liability Law, it is provided that,

"By reason of the nature and conditions of and the means used and provided for doing work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in su ch occupations and **which are unavoidable by the workmen therein.** (The italic is ours.)

And, then, in the following paragraph (3156), are the hazards comprehended by the Employers Liability Act are set out as follows:

"The occupations hereby declared and determined to be hazardous within the

meaning of this chapter are as follows:

(1) The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks. switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises."

In addition to this, the Legislature, in Paragraph 3147 of Chapter IV of Title 14, Civil Code of Arizona, of 1913, made the further finding that:

"Employment in all underground mines, underground workings, open cut workings, open pit workings, in or about, and in connection with, the operation of smelters, reduction works, stamp mills, concentrating mills, chlorination processes, cyanide processes, cement works, rolling mills, rod mills, and at coke ovens and blast furnaces, is hereby declared to be injurious to health and dangerous to life and limb."

"All reasonable presumptions are in favor of its (the law's) validity, and the burden of the proof and argument is upon those who seek to overthrow it." Erie R. Co. vs. Williams 223 U. S. 685, 699, 58 L. ed. 1155, 1160, 51 L. R. A. (N. S.) 1097, 34 Sup. Ct. Rep. 761. (Mountain Timber Co. vs. Washington, supra, and in this respect the court is not concerned in the matter of expediency or question of policy.

In sustaining as valid a state statute limiting the hours of labor in mines, the court, in Holden vs. Hardy, 169, U. S. 366, 18 Sup. Ct. 383, 42 L. ed. 780, said:

"We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is suported by the facts. **The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere exercise for an unjust discrimination, or the oppression, or spoilation of a particular case.** The distinction between these two different classes of enactments cannot be better stated than by a comparison of the views of this court found in the opinion in Barbier vs. Connolly 113 U. S. 27, and Soon Hing vs. Crawley, 113 U. S. 703, with those later expressed in Yick Wo vs. Hopkins, 118 U. S. 356." (The italic is ours.)

Northwestern Laundry vs. Des Moines, 239 U. S. 486, 60 L. ed. 396.

"The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the co-ordinate departments of the govern-

ment." Angle vs. Chicago, St. Paul, Etc., Railway, 151 U. S. 1.

Neither will the court substitute its judgment in lieu of that of the legislature in determining the correctness or propriety of classifications. Whether or not the employments classified by the legislature as extra-hazardous, in the Employers' Liability Law, would have been the same classification made by the court, or whether this was the best that could have been done, is not for the court to say. The legislature, in the exercise of its power, and discretion, has made a **finding of fact** that in certain designated employments, injury to employees is sure to result, growing out of the very nature of the employment and irrespective of care, and it not apearing that this classification made by the legislature was either arbitrary or made in bad faith, its judgment will not be disturbed.

Dow vs. Beidelman, 125 U. S. 680, 31 L. ed. 841.

In the case of Chicago, B. & Q. R. Co. vs. McGuire, 219 U. S. 569-570, 55 L. ed. 339, on the question of police power, the court said:

"Where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should

be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

"The legislature, being familiar with local conditions, is(primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained.

"In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."

The police power extends to the protection of the lives and health of the citizens, which is a matter of public concern. It is closely connected with the safety of employees, and undoubtedly belongs to that class of subjects over which the legislature possesses a regulatory power.

Texas & N. O. R. Co. vs. Miller, 221 U. S. 415, 55 L. ed. 795.

In case of Missouri Pac. R. Co. vs. Mackey, 127 U. S. 205, 32 L. ed. 107, in regard to the employers' liability law of Kansas, Justice Field said:

> "The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, whether it is in conflict with the clause of the 14th Amendment. The supposed hardship and injustice in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exists when the company, without any wrong or negligence on its part, is charged for injuries to passengers.
>
> "The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence."

Such laws are simply a question of legislative discretion.

> Minn. & St. Louis R. Co. vs. Beckwith, 129 U. S. 29.

In the case of State vs. Schlenker, 112 Iowa, 642, the court said:

> "Courts have no authority to interfere on the ground that the acts in question violate natural principles of right and justice. Ordinarily the legislature determines when the public welfare and safety demand its exercise; and, as a general rule, courts have nothing to do with the policy, wisdom, or necessity of the enactment."

"This court has never hesitated to declare that limitations upon state power in the Federal Constitution were not designed to interfere with the exercise of the state police power."

Barbier vs. Connolly, 113 U. S. 31;
Jones vs. Brim, 165 U. S. 180;
Cunnius vs. Reading School Dist. 198 U. S. 469.

"Consequently the test whether due process of law has been violated is that of reasonableness, as distinguished from arbitrary action; but this must not be understood to authorize the court to substitute its judgment for that of the legislature as to the necessity or propriety of the legislation."

Noble State Bank vs. Haskel, 219 U. S. 104;

Hurtado vs. People of California, 110 U. S. 530, 28 L. ed. 237; Patterson vs. The Eudora, 190 U. S. 169.

"Discrimination is not invalid if it is not so arbitrary as to be beyond the wide discretion that a legislature may exercise. It may rest on narrow distinction. Whether it makes for public welfare is a matter of legislative judgment, and the courts cannot set aside a law except upon the ground of want of power."

German Alliance Ins. Co. vs. Lewis, 233 U. S. 389, 58 L. ed. 1011.

"The Federal Supreme Court is not a place of refuge from oppressive and unequal legislation, as the hardship, impolicy, or injustice of state laws is not necessarily

a constitutional objection. With the folly or wisdom of a law the 14th Amendment has no concern."

Billings vs. Illinois, 188 U. S. 97, 102, 47 L. ed. 403;
Clark vs. Kansas City, 176 U. S. 114;
Mobile County vs. Kimball, 102 U. S. 691.

"This court has many times affirmed the general proposition that it is not the purpose of the 14th Amendment in the equal protection clause to take from the states the right and power to classify the subject of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority.

"That a law may work hardship and inequality is not enough. Many valid laws, from the generality of their application, necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject matter of its laws, and what shall be excluded."

Jeffrey Mfg. Co. vs. Blag, 235 U. S. 577, 59 L. ed. 369.

In an appeal taken in case of Easterling Lbr. Co. vs. Pierce, 235 U. S. 382, 59 L. ed. 281, the court said:

"An objection founded on U. S. Const., 14th Amend. to the classification provided by Miss. Laws, 1908, chap. 194, abrogating the fellow servant rule as to employees of a railroad corporation, is clearly without merit and will not serve as a basis of a writ of error, and case was dismissed for want of jurisdiction."

The Indiana employers' liability law, which embraces many features of the Arizona law, has been held valid by this court.

Chicago, I. L. R. Co. vs. Hackett, 228 U. S. 562, 57 L. ed. 967.

In the case of German Alliance Ins. Co. vs. Lewis, 233 U. S. 414, 58 L. ed. 1022, the court said:

"The subject of judicial inquiry in deciding the question of **power** is not to be confused with the scope of legislative considerations in dealing with the matter of **policy.** Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

Munn vs. Illinois, 94 U. S. 126, 24 L. ed. 83.

"That the law may seem unreasonable, oppressive, or absurd, or that there may be objections to its policy or expediency, is not sufficient to justify its judicial repeal. These are matters for which the legislature mustly shortly answer to its constituents

who can correct them. It must be in direct conflict with some expressed prohibition of the Constitution."

New York vs. Miln, 36 U. S. 11 Pet. 138, 9 L. ed. 662;

Cooley's Constitutional Limitations (6th ed.) 192, 197, and pp. 200-203.

Rio Grande Lumber Co. vs. Darke, 167 Pac. (Utah) 242, (pamphlet.)

It is said, in the well considered case of Rio Grande Lumber Co. vs. Darke, 167 Pac. (Utah) 242-243 (October 1, 1917, Advance Pamphlet) by Thurman, J.:

"One of the fundamental rules to be applied in determining a question of this kind is that a court will not declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights are guaranteed or protected by the Constitution.

"The legislative and judicial are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions; and cannot, directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the constitution, is not conferred upon it.

"The task is therefore a delicate one, and only to be entered upon with reluctance and

hesitation. It is a solemn act in any case to declare that a body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold.

"It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallability of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."

Cooley's Constitutional Limitations (6th ed.) 192, 197, 200-203, and pp. 216, 217.

9 Ency. U. S. Supreme Court Reports, pp. 521, 523, 524, 529.

Legislature takes notice that employer and employee are not upon equal footing. 9 Ency. U. S. Sup. Ct. Repts. 529,

On due process of law, see 5 Ency. U. S. Supreme Ct. Repts. 533, n. 86.

This court usually follows the decision of the lower court, when no clear and palpable error is shown.

Seaboard Air Line R. vs. Lorick, 243 U. S. 572, 61 L. ed. 907.

After citing many authorities, Mr. Taylor, in his recent work on Due Process of Law, (Par. 182) concludes:

"From the foregoing cases it clearly ap-

pears that as reasonableness is primarily a subject for the determination of the legislature, the courts will not set the legislative judgment as to reasonableness aside and substitute its own in its stead, except when it is manifest that the law in which the legislature has embodied its will is arbitrary or enacted n bad faith."

Wilmington Mining Co. vs. Fulton, 205 U. S. 60, 70, 51 L. ed. 708.

Chicago Dock and Canal Co. vs. Fraley, 228, U. S. 680, 57 L. ed. 1022.

In the case of German Alliance Ins. Co. vs. Lewis, 233 U. S. 414, 34 Sup. Ct. 612, 58 L. ed. 1022, the court said:

"The subject of judicial inquiry in deciding the question of **power** is not to be confused with the scope of l egislative considerations in dealing with the matter of **policy.**

"Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best meanes to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercsed in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. (The italic is ous.)

This court in the case of Louisville & N. R. Co. vs. Melton, 218 U. S. 52-57, 30 Sup. Ct. 36, 54 L. ed. 929, in a personal injury case under the Ky. statute, said:

"That the 14th Amendment was not intended to and does not strip the states of the power to exert their lawful police authority is settled, and requires no reference to authorities.

"And it is equally settled—as we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because, as the result of the exercise of the power to classify, some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition.

"There is, therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

"The legislature of a state has necessarily a wide range of discretion in distinguishing, selecting and classifying, and it was declared that it was sufficient to satisfy the demand of the constitution if a classification was practical, and not palpably arbitrary.

"The whole case is put on the proviso, and the argument to that is merely one of the many attempts to impart an overmath-

ematical nicety to the prohibitions of the 14th Amendment."

That "a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability, with consequent loss of earning power, among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relatives dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in New York C. R. Co. vs. White 243 U. S. 188 ante 247, 37 Sup. Ct. Rep. 247, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system ofoccupation taxes," is no longer an open question. (Mountain Timber Co. vs. Washington, 243 U. S. 219) and, likewise, that this (personal injuries and disability with consequent loss of earning power) is a loss arising out of the business, and however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer."

New York C. R. Co. vs. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. ed. 667.

And as suggested by this court in the same case, **"Who is to bear the charge?"**

There have always been two schools of thought concerning the relations exisiting be-

tween masters and workmen, One may be called the property view and the other the humane view.

Under the common law, the burden of industrial accident, where no fault was attributed to employer or workman, fell on the workman. Under this law in the hazardous occupations enumerated, it falls, primarily at least, on the employer and, as well said by the Supreme Court of California in the case of Western Indemnity Co. vs. Pillsbury, 170 Cal. 686, 151 Pac. 398, 402; "It cannot be said that the one rule or the other is a necessary or logical result of fundamental principles of justice" but "the very trend of legislation exemplified by the act before us illustrates how general is the belief that an enlightened conception of justice requires that the old rule be superseded by the new. There is nothing contrary to the permanent and underlying notions of human right in the declaration that he who is conducting an enterprise, in the operation of which injury to others is likely to occur, shall respond for such injury to those who have not, by their own wilful misconduct, brought it upon themselves."

And as said by this court in the Washington case:

> "We are clearly of the opinion that a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability, with consequent loss of earning power, among the men and women employed, and, occasionally, loss of life of those who have wives

and children or other relatives dependent upon them for suport, and may require that these human losses shall be charged against the industry."

"The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay roll, the repair account, or any other item of cost." (Mountain Timber Co. vs. Washington, supra.)

This was the purpose and effect of the act under consideration. As said by the Supreme Court of Arizona, in Inspiration Consolidated Copper Company vs. Mendez, 19 Ariz. 166 Pac. 278, 282:

> "Thereby the statute declares the occupations enumerated as inherently hazardous and dangerous to workmen engaged therein, and declares that which is evident to every observant person, that the risks and hazards incident to such occupations are unavoidable by the workmen engaged therein. Such occupations designated as hazardous and dangerous, and inherently unsafe, are deemed for that reason injurious to the health and dangerous to life and limb of the workmen engaged therein, and clearly fall within the police powers of the state for regulation and control."

That such regulation is within the police power of the State is no longer an open question and "if any industry involves so great a human wastage as to leave no fair profit beyond" a reasonable compensation for the loss of life and limb, then "the State is at liberty in the interest of the safety and welfare of its people to prohibit such an industry altogeth-

er." (Mountain Timber Co. vs. Washington.)

While "it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the approximate cause be culpable or innocent" (New York C. R. Co. vs. White) and under the Acts considered by this Court in the "workmen's compensation cases" (New York, Iowa and Washington) nothing short of a wilful intention to bring about the injury on the part of the employee or an injury resulting solely from intoxication of the person injured, will defeat compensation to the injured employee. In this respect, the Arizona law again differs from the New York, Iowa and Washington laws.

Under the Arizona law, if an injury received by an employee is **caused** by his **negligence**, he cannot recover. Not wilful negligence; not gross negligence; not contributory negligence, but **any** negligence causing the death or injury.

The most valuable defense possible to retain in safeguarding the interests of the employer is to say to him that neither you nor your business shall in any manner be responsible for injury to an employee due in any maner to negligence of the employee.

In other words, after having made the finding of fact that injury in these extra-hazardous employments are bound to follow from the very nature of the employment, the legislature in the exercise of the greatest degree of fairness to the employer says to the employee, "you may go thus far but no farther, and if you receive injury and it is caused by your own negligence then it is not received as a necessary result of the extra-hazardous occupation and you canot recover."

The Arizona Employers' Liability Law was enacted by the Legislature pursuant to a constitutional mandate (Sec. 7, Article XVIII of the Arizona Constitution) providing that:

> "To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employers' Liability Law, by the terms of which any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

The purpose of the Legislature in carrying out this mandate is expressed in Par. 3153 of the Act:

> "This chapter is and shall be declared to be an employers' liability law as prescribed in section 7 of Article XVIII of the state constitution."

Then by Par. 3154 it is provided:

> "That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of

any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

The cutting off of liability under the Arizona Act where the injury is due to negligence of an employee and in extending it to all injuries other than cases of wilful intention to bring about the injury and injuries resulting from intoxication under the acts revived in the "Workmen's Compensation Cases" are each logical when the nature and purposes of the acts are considered.

In fastening upon the particular hazardous business from which, as the legislature found as a fact, injury "because of risks and hazards which are inherent in such occupations" were "unavoidable by the workmen therein," as an operating expense, liability for injuries "caused by any accident due to a condition or conditions of such occupation" it was an expression of the utmost fairness to the employer, and the carrying out of the very purpose of the act in providing that no liability should attach if the injury was the result of negligence on the part of the employee injured or killed. While negligence (unless of a character as to show a wilful intention to bring about the injury) was abolished as a defense by the New York, Iowa and Washington Acts, it was retained as a defense under the Arizona Act. And as contributory negligence presupposes the existence of negligence on the part of the employer, and as negligence on the part of the employer does not enter into consideration in determining liability under the Arizona Act, the result is that the only common law

defenses abolished by the Arizona Act are the fellow servant doctrine and rule relating to the employees' "assumption of risks."

The object of the police power, says this court in Barbier vs. Connolly, 113 U. S. 31, Sup. Ct. 357, 28 L. ed. 923, is "to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add **to its wealth and prosperity.** (Italic is ours.)

The exercise of the police power in a proper case justifies the destruction of property, the abatement of whatever may be regarded as a public nuisance and as said by this court in the White case: "liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. St. Louis & S. F. R. Co. vs. Mathews, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; Chicago R. I. & P. R. Co. vs. Zernecke, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229."

In the case of St. Louis & S. F. Co. vs. Mathews (supra) the court said:

> "The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of

railroads. **When both parties are equally faultless,** the legislature may properly consider it just that the duty of insuring private property against loss and injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, **rather than upon the owner** of the property, who has no control over or interest in these instruments. (Italic is ours.

In determining the constitutionality of a law enacted pursuant to its police power by a state, the court may not consider hardships or even injustice liable to be worked by the law as heretofore pointed out. The only issue before the court for consideration is one of power, not policy, and it is universally conceded that the limitations of this power are circumscribed only by the requirements of public safety, health, peace, morals, education, good order and prosperity of the people.

"It (police power) is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passersby; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of

the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. **Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.** (Italic is ours)

Lawton vs. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385.

REASONABLE COMPENSATION

Adopting as a text such expressions as "Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a **moderate and definite** compensation in money to every disabled employee, or, in case of his death, to those entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence," (New York C. R. Co. vs. White) it is contended by plaintiff in error that the act under consideration violates the Fourteenth Amendment to the United States Constitution for the reason that it subjects the employer to **unlimited liability without fault.**

At the outset it must certainly be conceded by defendant in error that the compensation allowed must be reasonable, and it must certainly be conceded by plaintiff in error that what is "reasonable compensation" is ultimately a question for the courts to determine.

"The question of the reasonableness of a rate of charge for transportation by a railroad company involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place **in the absence of an investigation by judicial machinery,** it is deprived of the lawful use of its property, and thus, in substance and effect of the property itself, without due process of law, and in violation of the Constitution of the United States." (Italic is ours.)

Chicago M. & St. P. R. Co. vs. Minnesota
134 U. S. 418, 33 L. ed. 970.

While this was a rate case, it does not differ in principle from the case under consideration.

A sale of compensation may, in the solution of a general plan of adjustment, be provided by the legislature, as was done in the acts under consideration in the "Workmen's Compensation Cases." But, if so fixed, the compensation provided must in each case be reasonable, and whether or not it is reasonable is a judicial and not a legislative question. Or, upon the other hand, the legislature may, as the Arizona statute did, provide for a reasonable compensation and leave the amount of such compensation to be fixed by a court of competent jurisdiction in the ordinary course of law. And, surely, at this late day, it will not be urged that the plan of fixing the amount of injury sustained by an in-

jured employee, by "investigation by judicial machinery" is not due process of law.

The law (Par. 3154) provides that, in case of death or injury under the conditions set forth, the employer "shall be liable for the death or injury" sustained by the employee. The employer is not subjected to punishment for negligence or otherwise, but is required to pay as compensation the amount of injury sustained and this amount is to be determined by "investigation by judicial machinery."

Under the Arizona law, as under the Federal Safety Appliance Act, the employer is required to pay such amount as will compensate for the injury sustained, and nothing more, and that amount must be proven by the well established rules of evidence.

Sweet vs. Chicago & R. Co. 157 Wis. 400, 147 N. W. 1054.

Devine vs. Chicago & R. Co. 266 Ill. 248, 107 N. E. 595.

Compensation, to be reasonable, must be reasonable to both employer and employee. If, upon the one hand, the employer is required to pay more than will justly compensate the injured employee for the injury received, then it is unreasonable as to the employer, and if, upon the other hand, the employee is required to accept less than will justly compensate him for the injury received, then it is unreasonable as to him.

It could not add either to the effect or validity of a nact for the legislature to impress a limitation of $10,000 or $50,000 as the maximum value of a life or $5000 or any other sum as the maximum value of an eye, an arm or a leg.

Upon the reasonableness of such limitation being questioned it would again become the duty of the court to determine whether or not the limitations prescribed were such as to deprive either party of due process of law or the equal protection of the laws.

In any event, the question to be ultimately determined by the court in each case is whether a verdict rendered in fixing the value of an injury is or is not sustained by the evidence and which was passed upon by the lower court in this case.

We do not know of any law that will give exact justice in all cases. The verdict of two juries on the same facts is seldom the same. There cannot be a just scale of compensation in all cases. Where a statute fixes as a standard what is termed a reasonable amount, according to a definite scale, as compensation for an injury, ofttimes the greatest injustice is done in operating under such system. Under many of these systems the compensation is so small that the injured employee is not benefited by receiving the award fixed by the statute.

Whether the legislature could have passed a better law, or that its present law is faulty, or whether the systems adopted by some of the states more nearly conform to the views of the court are not questions upon review. The legislature necessarily is clothed with a wide field of discretion in law-making. When the Arizona Act was passed the legislature was acting within its police power and whether that law is wise or unwise, or whether or not a different law in the opinion of the court should have been enacted, and whether or not the legislature in its discretion should have substituted its judgment to that of a jury in

determining the value of injuries, are all questions for future legislatures to deal with.

INTEREST ON JUDGMENT

Paragraph 3161, chap. tit. 14, Civil Code of Arizona, 1913, is as follows:

> 3161. "In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court be sustained by the higher court or courts; then, and in that event, the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

The supreme court of Arizona, case of Mendez, 166 Pac. 278, has held this statute valid. The interest clause of this statute has not been asigned as error on appeal, and, for all we know, no claim will be made that it is unconstitutional. Had this question been properly raised in the lower court, then this court would determine whether or not it does offend against the Constitution of the U. S.

The interest clause, which is a matter of costs, falls alike upon all classes under the statute.

The Arizona legislature, for the government of procedure under this statute in the courts, and for the protection of those who have obtained judgments in the trial courts against frivolous appeals, and to compensate

them, to some extent, for expenses necessary in attending to their interests when appeals have been prosecuted without just cause, has enacted this statute. The statute does not at all affect the ground of recovery or the measure of recovery; it deals with a question of costs.

Missouri, K. & T. R. Co. vs. Harris, 234 U. S. 412, 58 L. ed. 1377.

"Whether interest shall accrue upon a judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is of course entitled to the interest so prescribed.

Morley vs. Lake Shore & Mich. So. R. Co. 146 U. S. 162, 36 L. ed. 929, first column.

"Interest is allowed by way of damages for failure to pay money when it is due, and frequently is not allowed except from the time the amount to be paid has been definitely ascertained. But there are many cases in which interest is charged from a prior date."

Consal vs. Cummings, 222 U. S. 262, 56 L. ed. 197, bottom of second column.

"The equal protection of the laws is not denied to life insurance companies, by Tex. stat. imposing penalty for failure to pay loss, after demand therefor, an additional of 12 per cent damages and reasonable at-

torneys' fees, although such obligation is not imposed upon other classes of insurance companies."

Fidelity Mutl. Ass. vs. Mettler, 185 U. S. 308, 46 L. ed. 932, 2nd column.

"Double liability and attorneys' fees may be exacted under Ark. laws from a railway company refusing to pay for killing of live stock by one of its trains within 30 days after the owner's demand, without denying the railawy company the due process of law guaranteed by U. S. Const., 14th Amend., though litigants in general are not subject to the same burdens."

Kansas City So. R. Co. vs. Anderson, 233 U. S. 325, 58 L. ed. 983.

Mo. K. & T. R. Co. vs. Cade, 233 U. S. 642, 58 L. ed. 1135.

Under the Interstate Commerce Commission law, a reasonable attorneys' fee may be taxed by the court against a carrier.

Meeker vs. Lehigh Valley R. Co. 236 U. S. 412, 59 L. ed. 644.

This court has held the Neb. statute which imposes an attorneys' fee in a suit against a fire insurance company a valid exercise of its power to classify, and free from constitutional objection, and reaffirming the doctrine of Fidelity Mut. Life Asso. vs. Meetler, 185 U. S. 308, 46 L. ed. 922, where the statute of Texas was sustained, alone to life insurance policies, which authorized the enforcement, not only of a reasonable attorneys' fees, but also 12 per cent damanges after demand in case of the unsuccessful defense of a suit to enforce a life insurance policy.

Farmers' & M. Ins. Co. vs. Dobney, 189 U. S. 301, 47 L. ed. 821.

The reason for imposing a penalty of 12 per cent as costs, under the Arizona statute, in case of affirmance on appeal, is tersely stated in the opinion of Lancashire Ins. Co. vs. Bush, 60 Neb. 116, 82 N. W. 313, as follows:

> "The reason is not far to seek. It is a matter of common knowledge that corporations engaged in the business of insuring real estate have long been accustomed to vexatiously and oppressively resist payment of claims arising under their policies. The reports of this court bear abundant evidence to the fact that no other class of litigants has so persistently endeavored to escape liability from their contract obligations by imposing technical and unconscionable defenses to actions instituted against them.
>
> The law in question was designed to repress an evil practice and to advance public interests and promote justice. It was an exercise of legislative power justified by considerations of public policy."

What is said in the Bush case, supra, is equally true as to corporations when sued to recover damages fos personal injury to their employees; they have long been accustomed to vexatiously and oppressively resisting the payments of judgments rendered against them of which fact the reports of this court bear abundant evidence.

We will briefly consider plaintiff in error's assigned errors. (Transcript of Record, pp. 262-269.

Assignments I, II and III are clearly without merit

Assignment IV.

Under this assignment complaint is made of the overruling of plaintiff in error's special demurrer No. 6, by which it was alleged that the injury was caused wholly by and resulted from the **usual** and **ordinary** risks of the employment.

In construing the Arizona Law relative to assumed risks, the Supreme Court of Arizona in the case of Inspiration Consolidated Copper Co. vs. Mendez (supra) said:

"The statute clearly does not require as a condition of liability that the accident causing the injury proximately resulted from the master's negligence, and it as clearly does exclude as a matter of defense the assumption of all ordinary and extraordinary risks inherent in the occupation. Such risks and dangers as are inherent in the occupation are declared to be unavoidable risks and dangers, and therefore it necessarily follows that the employee in entering upon his duties does not assume such ordinary inherent risks, although known to him. Such risks as he may assume must be risks and dangers other than risks and dangers inherent in the occupation.

Assignment V.

The constitutionality of the Arizona Employers' Liability Act raised by this assignment has been covered in our opening argument.

Assignment VI.

The validity of the law under the Arizona constitution raised by this assignment has

been determined in favor of the act by the Supreme Court of Arizona in the cases of Inspiration Consolidated Copper Co. vs. Mendez (supra) and Superior & Pittsburg Copper Co. vs. Tomich (supra.)

Assignment VII.

The striking from plaintiff in error's answer that portion complained of under this assignment was proper for several reasons:

First: It does not excuse plaintiff in error for the injury or charge negligence on the part of defendant in error.

Second: The fact that defendant in error was upon other occasions and at other times interrupted by the calcine car is no evidence that he was so interrupted at the time of the injury.

Third: The fact that he was warned at other times is no evidence or even argument that he was so warned at the time of the injury.

Fourth: If it could be contended that the allegation was one of negligence, then it was merely cumulative as the answer contained the direct allegation of negligence, that defendant in error was warned of the approach of the car and negligently and deliberately refused to remove himself from the hopper and received such injury by reason thereof. (Transcript of record, pages 13-14.)

It could not be shown that either party to this cause was careful or negligent at other times.

Ariz. & N. M. Ry. Co. vs. Clark, 207 Fed. 820.

Assignment VIII.

This assignment also presents the common law doctrine of assumption of risk, which did not arise in this action. This was fully discussed under Assignment IV.

Assignment IX.

This assignment presents the question of liability without fault, which has been argued at length in the opening portion of our brief.

Assignment X.

The matter of permitting defendant in error to amend his pleading was within the discretion of the trial court.

Assignments XI and XII

These assignments of error do not point out the evidence complained of; do not conform to Sec. 1, Rule 35, of the rules of this Court, and must be disregarded.

Assignment XIII.

It was not only immaterial what the habits and customs of witness were in stopping the car at other times, (29 Cyc. 619. Missouri K. & T. Ry. Co. vs. Johnson, 92 Tex. 380, 48 S. W. 568) but this assignment also does not conform to Sec. 1, Rule 35, of the rules of this court and must be disregarded.

Assignments XIV, XV, XVI and XVII.

These assignments, and each of them, are not only devoid of merit, but likewise fail to comply with Sec. 1, Rule 35, of the rules of this court and must be disregarded.

Assignments XVIII, XIX, XX and XXI

These instructions were all requested by

plaintiff in error upon the theory of the common law rule of contributory negligence in bar of the cause of action.

Plaintiff in error did not plead or offer to plead contributory negligence in reduction of its liability to defendant in error, but its whole theory was, and this theory was followed out in the requested instructions that contributory negligence on the part of defendant in error would bar an action under the Employers' Liability Law.

As heretofore pointed out, this act was upheld and construed by the Supreme Court of Arizona in the cases of Superior & Pittsburg Copper Co. vs. Tomich, 19 Ariz.———165 Pac. 1101, and Inspiration Consolidated CopperCo. vs. Mendez, 19 Ariz.———,166 Pac. 278. In the Tomich case the court in passing upon this identical question said:

> "The defendant set forth in its answer the contributory negligence of the plaintiff, consisting of the manner in which the plaintiff was performing his duties at the time of the accident, but defendant's answer does not set forth any claim for a reduction of damages by reason of such negligence, but claims such contributory negligence as a complete, not a partial, defense to the action. The answer is evidently interposed upon the theory of the common-law rule of contributory negligence in bar of the cause of action. Uuder the provisions of Chapter 6, supra, nothing less than the sole negligence of the employee injured will bar an action based on the statute for damages. Negligence of the employee contributing to the injury may serve to reduce the amount of the recovery, but will not bar recovery.

"The defendant, having in its answer admitted that its negligence in part was the cause of the damages, by setting forth a charge of contributory negligence against the plaintiff, authorized a verdict against defendant in any event. The matters left open for inquiry were the amount of the damages the plaintiff was entitled to recover as measured by the allegations of the complaint and the evidence, and whether the accident was due to a condition or conditions of the employment and such as is unavoidable."

The instructions complained of having been offered, therefore, upon the common-law theory of absolute defense against liability were under the construction placed upon this act by the Supreme Court of Arizona properly rejected.

Assignment XXII.

Due to the fact that the court instructed the jury (Transcript of record, page 211), "if such injuries were caused by the negligence of the plaintiff himself, then he cannot recover in this action and your verdict must be for the defendant," the instruction complained of under this assignment could be but cumulative to say the least, and was properly refused.

Assignment XXIII.

This assignment would be without merit even if the objection had been properly preserved.

The remarks complained of were not only invited by previous argument on the part of counsel for plaintiff in error, but were wholly immaterial as it was not necessary for the jury

to find that there was negligence on the part of plaintiff in error and the court so instructed. Furthermore, the transcript of testimony does not show the time or circumstances under which an objection was made to the remarks; does not show a request to the court to withdraw the remarks or to admonish the jury, and does not show an exception.

Assignment XXIV

The questions presented in this assignment are also without merit. Similar questions were presented to and passed upon by the Supreme Court of Arizona in the Superior and Pittsburg Copper Co. and Inspiration Consolidated Copper Co. cases (supra).

Assignment XXV does not present any question for the consideration of this court.

Assignments XXVI and XXVII are wholly without merit.

Assignment XXVIII.

The court did not err in denying the motion for new trial. The affidavits filed in support of the motion for new trial were merely cumulative and contradictory of the evidence taken on the trial and did not justify the granting of a new trial.

Lowry vs. Mt. Adams & Eden Park etc., 68 Fed. 827.

Southard vs. Russell, 16 How. 547, 569, 14 L. ed. 1062.

INTEREST ON JUDGMENT

Paragraph 3161 Civil Code of Arizona 1913, provides that if the judgment of the

lower court be sustained by the higher court, then there shall be added by the higher court interest at the rate of 12 per cent. per annum on the amount of such judgment from the date of filing of the complaint in the lower court, which in this case was March 30, 1915. We request that such interest be added in case this judgment is affirmed.

Respectfully submitted,

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Supreme Court of the United States,

OCTOBER TERM, 1917.

Nos. 20&21

THE ARIZONA COPPER COMPANY, LIMITED,
Plaintiff in Error,

vs.

JOSEPH B. HAMMER,
Defendant in Error.

THE ARIZONA COPPER COMPANY, LIMITED,
Plaintiff in Error,

vs.

RICHARD BRAY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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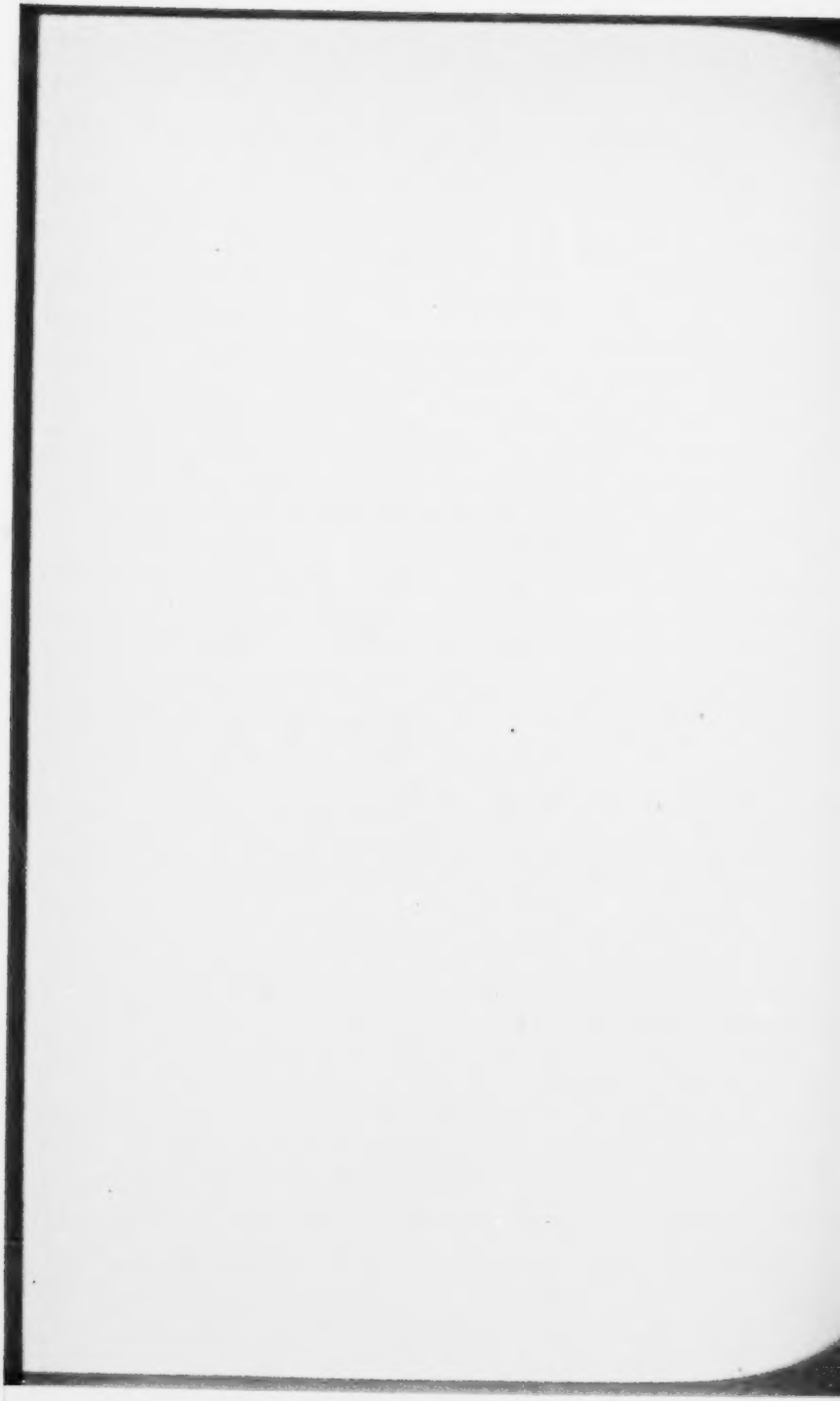

Supreme Court of the United States,

OCTOBER TERM, 1917.

Nos. 161 and 162.

THE ARIZONA COPPER COMPANY, LIMITED,
Plaintiff in error,

vs.

JOSEPH B. HAMMER,
Defendant in error.

THE ARIZONA COPPER COMPANY, LIMITED,
Plaintiff in error,

vs.

RICHARD BRAY,
Defendant in error.

Brief for Plaintiff in Error.

These cases come before the Court by writs of error to the United States District Court for the District of Arizona, under Section 238 of the Judicial Code.

Statement.

The action brought by Joseph B. Hammer was to recover $50,000 damages for personal injuries sustained while making repairs and improvements on a hopper, on the feed floor of the defendant's smelter, a large quantity of hot calcine having

been discharged upon him from a loaded car operated above the hopper. A verdict was rendered in his favor for $12,000.

The action brought by Richard Bray was to recover $50,000 damages for personal injuries alleged to have been sustained by him while working in the defendant's mine. The injuries were caused by rock and earth falling upon him from the roof of the tunnel in which he was engaged. A verdict was rendered in his favor for $9,000.

Both actions were brought under the Employers' Liability Law of Arizona (Ch. 6, of Title 14, Rev. Stat., 1913), which declares that, in certain hazardous occupations, including mining and smelting, employers shall be liable in damages, *to an unlimited extent*, for injuries sustained by their employees resulting from accidents due to conditions of the occupation, where the injury is not caused by the negligence of the injured employee. This unlimited liability is imposed irrespective of any negligence or fault on the part of the employer and even though he may be desirous of complying with the Workmen's Compensation Law.

In the Hammer case, the question of the validity of the Employers' Liability Law was raised by demurrer to the complaint (Record, p. 8), which was overruled, and an exception duly taken (Record, pp. 16, 27).

In the Bray case, the constitutional question was duly raised by demurrer (Record, pp. 5, 10) and by motions made to dismiss the complaint (Record, pp. 12, 110).

Assignments of Error.

The Employers' Liability Law of Arizona violates the Fourteenth Amendment of the Federal Constitution, in that it deprives the plaintiff in error of its property without due process of law and denies it the equal protection of the law.

POINTS.

FIRST.

The Arizona Constitution and legislation.

There is in Arizona a Workmen's Compensation Law as well as an Employers' Liability Law, but the former is not compulsory upon the workman. A person injured in Arizona, while engaged in a hazardous occupation, has his choice of three remedies:

1. He may claim compensation under the Workmen's Compensation Law;
2. He may sue under the Employers' Liability Law;
3. He may bring the ordinary common law action.

I. While the Workmen's Compensation Law is compulsory upon the employer, it is not compulsory upon the workman. He may elect, even after the accident, to pursue one of the other remedies open to him.

Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz., 382.

II. Under the Employers' Liability Law, the employer is made liable *to an unlimited extent, even without fault*, provided the injury was not occasioned wholly by the negligence of the person injured.

III. Both under the Employers' Liability Law and at common law, the employer is deprived of all his common law defenses, even though he is willing to pay the compensation provided by the Workmen's Compensation Law. The assumption of risk and contributory negligence are made questions of fact for the jury; and if there has been contributory negligence in an action under the Employers' Liability Law, the plaintiff may still recover, although the damages are to be diminished in proportion to his negligence.

IV. The pertinent provisions of the Constitution and statutes are set forth in Appendix A, hereto annexed.

SECOND.

Unique features of the Arizona legislation.

I. Arizona is the only State that has made its Workmen's Compensation Law a nullity, by not making it compulsory upon the workman when its terms have been accepted by the employer and by permitting the workman, where the injury was not occasioned wholly by his own fault, to sue under a law which imposes an entirely new and unlimited liability without fault and practically deprives the employer of every defense known to the common law, thus making the trial a mere assessment of damages.

This is all the more serious in Arizona in view of the constitutional provision (Art. II., Sec. 31), forbidding any limitation in the amount of damages recoverable for causing the death or injury of any person, and the further provision (Art. II., Sec. 23) empowering the legislature to provide for a verdict of nine or more jurors in civil cases; which the legislature subsequently did (Rev. Stat., 1913, Sec. 532). In a strictly mining community such as that which exists for the most part in Arizona, the jurors are necessarily drawn from the very employees whose claims will be brought before the courts under the Employers' Liability Act. The cumulative effect of all this legislation is, therefore, to favor unduly the large and controlling class of employees at the expense of the relatively small class of employers. The consequences are similar to those which this Court had in mind in Yick Wo v. Hopkins (118 U. S., 356), when it said (p. 374):

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohbition of the constitution."

II. In all other legislation of this kind, there has been a mutuality in the apportionment of the risk and an attempt to reach a scientific, or at least equitable, basis of compensation, established usually upon a definite system graduated to the estimated impairment of the earning powers of the workman, thus enabling the employer to determine with reasonable accuracy the tax or insurance that he must pay as a condition of being permitted to engage in an industry which, by its mere operation, will inevitably result in injuries to the persons employed.

III. The legislation in Arizona was obviously the result of compromise, in which, as the event proved, substantially everything was yielded to the workmen. It was apparently assumed that all employees would willingly accept the terms of the Workmen's Compensation Law, and that employers could be compelled to do so by holding over them the threat of the unlimited liability to which they would be exposed without any fault on their part, under the Employers' Liability Law. Unfortunately, the legislation did not work out in that manner, in actual practice; for the enterprising attorneys who make a specialty of such business immediately perceived the possibilities which lay in an Act imposing unlimited liability without fault, where the defendant was deprived of all defenses except the negligence of the plaintiff and where the consequences even of that negligence could easily be placed upon a relative basis, which would virtually nullify the defense of negligence.

IV. The Constitution of Arizona (Art. XVIII., Sec. 8, *post*, p. 16) required the legislature to enact a "Workmen's *Compulsory* Compensation Law"; and the first section of the Act actually passed by the legislature (Sec. 3163, *post*, p. 19) states that it is a workmen's *compulsory* compensation law.

What the members of the Constitutional Convention doubtless had in mind, and what the legislature apparently

set out to accomplish, was the enactment of a statute that would compel employers in dangerous occupations to make compensation on a reasonable basis for injuries sustained in such occupations and to compel workmen to accept such compensation. But, in enacting the law, the compulsory feature as to the workmen was entirely eliminated.

THIRD.

The principles established by this Court in such cases.

I. This Court has given very careful consideration to various workmen's compensation Acts and employers' liability laws, those passed by the Federal Congress as well as those enacted by state legislatures. In the case of the Federal Employers' Liability Act (35 Stat. L., 65), negligence on the part of the employer must be established; and in the case of the Federal Compensation Law (35 Stat. L., 556), the liability is strictly limited to a year's wages.

II. Various phases of such legislation have been considered and the grounds on which it may be sustained have recently been enunciated by this Court, in cases arising under the laws of New York, Iowa and Washington.

New York Central R. R. Co. v. White, 243 U. S., 188;
Hawkins v. Bleakley, 243 U. S., 210;
Mountain Timber Co. v. Washington, 243 U. S., 219.

The New York and Washington statutes are compulsory upon workmen as well as employers; and, under the Iowa statute, if the workman rejects the compensation provided by the Act and brings an action at law, the employer may plead all the common law defenses.

III. In reaching the conclusion that these Workmen's Compensation Acts were a valid exercise of legislative power,

this Court was influenced by two considerations: one, involving a legal principle, that in taking away the common law defenses, or some of them, from the employer, the legislature had substituted a substantial equivalent, in limiting the liability of the employer according to a prescribed and reasonable schedule, which would probably not be any more onerous upon him than his common law liability; and the other, involving social and economic considerations, that the legislation was a valid exercise of the police power, in promoting the general welfare.

In the White case, this Court said (243 U. S., 188, 203):

> "It is plain that, on grounds of natural justice, it is not unreasonable for the State, *while relieving the employer from responsibility for damages measured by common-law standards* and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute *a reasonable amount*, and according to a *reasonable and definite scale*, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence."

And again (p. 205):

> "Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making *a moderate and definite* compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, *in lieu of the common-law* liability confined to cases of negligence."

And in the Washington case, the Court said (243 U. S., 219, 234):

> "While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed * * *, yet it is evident that *the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burden imposed upon him*, so that, if the act is not valid as against employees, it is not valid as against employers."

IV. The justification for legislation of this kind is that, in the interest of society, hazardous occupations should themselves be charged with the reasonable burden of sustaining the inevitable loss resulting from the inherent risks of the business, which no ordinary care or foresight can guard against, and that a liability or insurance fund should be created by a tax upon the business, which, on the one hand, will afford substantial and speedy compensation to the injured employee, and prevent his becoming an object of charity, and, on the other hand, will protect the employer from uncertain and possibly ruinous verdicts that might bankrupt the business, to the injury, not only of the particular employer and of all other workmen employed by him, but of society generally.

The fund obtained as the result of such legislation is in the nature of an insurance against the joint risk in which the parties embark. The liability of the employer is defined and regulated according to the injuries sustained, and the right of the employee to receive, without delay, the entire compensation thus fixed, is established. Both employer and workman are directly benefitted, and the State is relieved from caring for many unfortunates who might otherwise become dependent upon it.

> New York Central R. R. Co. v. Winfield, 244 U. S., 147; dissenting opinion of BRANDEIS, J., pp. 165–7.

V. But legislation of this kind, as this Court pointed out, must be reasonable to the employer as well as to the employed. It promotes the general welfare only in so far as it relieves society from the ills of the existing system. One of the greatest of those ills was the heavy burden of litigation which the old system fostered, with long deferred and scant, if any, benefits to the person sustaining the injuries, with great expense both to the State and to the employer, and with an uncertain liability

thrown upon the employer, against which he could protect himself only by insurance in companies whose principal business consisted in combating all claims for injuries.

FOURTH.

Arizona legislation clearly unconstitutional.

The Arizona legislature completely failed to apply either of the principles referred to in the recent decisions of this Court.

I. The employer is deprived of his common law defenses and is given nothing in return, because the workman is left free to reject the compensation provided by the Workmen's Compensation Law.

II. The public welfare is not promoted by the legislation. It is still burdened with useless and mischievous litigation, much of it improperly promoted. Instead of quieting litigation, the Employers' Liability Law of Arizona is a direct incitement to additional litigation and even to the wilful infliction of injuries.

The statute will cause direct injury to society at large; for unlimited liability without fault will necessarily act as an effectual deterrent to the investment of capital in industries declared to be hazardous. Men of small means might be ruined by a single verdict; and large corporations would be in constant danger from excessive verdicts, as is obvious from the verdict of $12,000 in the Hammer case, and of $9,000 in the Bray case, $50,000 having been asked for in each case; while in another action decided by the Supreme Court of Arizona (Superior and Pittsburg Copper Co. v. Tomich, 165 Pac., 1101), now before this Court, a verdict was rendered for $8,000, in a case where the injury was confined to the first joints of three fingers.

Arizona owes its present state of development primarily and largely to the development of its mineral resources; and the employment of labor in that State is principally in the industries connected with the mining and treatment of ores, and the transportation of their product to market, all of which occupations are declared by the statute to be hazardous. It is surely not to the interest of the State and of the persons now engaged in the industries of the State to impose such ruinous conditions upon the employment of capital in the mining and transportation industries as to make their withdrawal probable and impede the investment of additional capital. That would have a disastrous effect not only upon the employers and workmen actually engaged in the hazardous occupations, but upon the entire population of the State.

III. Another peculiar feature of the Arizona Liability Law is in giving a workman, whose injury is due solely to his own negligence, the right to demand compensation under the Workmen's Compensation Law. Thus, in the only instance in which an employer could interpose a complete defense under the Liability Law, he is obliged to make compensation under the Workmen's Compensation Law.

IV. A further peculiar consequence of the Employers' Liability Law is that, if the employer pleads that the negligence of the workman contributed to the injury, he is thereby prevented from claiming that he himself was not guilty of negligence (Superior and Pittsburg Copper Co. v. Tomich, 165 Pac., 1101); and if the employer is actually guilty of some negligence, he gets off more lightly than if he is entirely free from fault, because, in the former case, the liability will be apportioned between the employer and employee in proportion to their negligence (See dissenting opinion of Ross, J., in Superior and Pittsburg Copper Co. v. Tomich, 165 Pac., 1185, 1186).

V. A further peculiar feature of the Arizona Liability Law is that there may be a recovery in the case of death, even

where there is no one in existence who was in any way dependent upon the decedent, and even though his next of kin may be enemies of the state and nation, or even though he may have no ascertainable next of kin. Workmen's compensation laws should limit the benefits to the injured person or those actually dependent upon him; and this principle has been universally recognized in this and other countries.

VI. No other State, so far as we have been able to ascertain, has ever gone to the extreme extent shown in this Arizona legislation, of subjecting employers to unlimited liability without any fault on their part, or without any compensating obligation on the part of the workmen. The Arizona Workmen's Compensation Law is a mere farce, so far as any protection to the employer is concerned; and it is resorted to by the workman only when his own conduct has effectually barred his recovery in an action at law.

FIFTH.

Recent decisions of the Supreme Court of Arizona sustaining the legislation.

The Employers' Liability Law has been declared to be valid by the Supreme Court of Arizona in two cases recently decided by it, which are now before this Court.

Inspiration Consolidated Copper Co. v. Mendez, 166 Pac., 278; 19 Ariz., ; dissenting opinion of Ross, J., not yet published, but annexed hereto as Appendix B (*post*, p. 21);

Superior and Pittsburg Copper Co. v. Tomich 165 Pac., 1101; dissenting opinion of Ross, J., 165 Pac., 1185.

The cases were decided at the same time (July 2, 1917); but the opinion in the Mendez case was written first (165 Pac., 1101, 1103).

I. *Inspiration Copper Co. v. Mendez.*

That was an action under the Employers' Liability Law of Arizona, for injuries sustained by Mendez while working in the Company's mines. The injury was not claimed to have been the result of defendant's negligence, but to have been due to the condition of the occupation, as defined by the statute. The defendant assailed the validity of the law on the ground that it violated the Fourteenth Amendment, in that it attempted to create a liability without fault, thus depriving the defendant of its property without due process and denying it the equal protection of the law. A verdict was rendered in favor of the plaintiff for $5,500.

In the Supreme Court of Arizona, the same argument seems to have been addressed to the Court by the appellant, as was addressed to this Court in the White and other workmen's compensation cases heretofore referred to. At any rate, the two Justices who united in the prevailing opinion assumed that the question was "identical" with that considered by this Court in the White case, and that the decision in the White case was controlling upon them. On this point, the Court said (166 Pac., 278, 283):

> "The statute under consideration in the White case is a compensation statute of the State of New York. The constitutional question involved in that case as shown by the foregoing statement of the matter *is the identical question raised in this case*, viz., the power of the State to create a liability against the employer for accidental injuries to employees, which occur without fault of the employer."

And after copious extracts from the opinion of this Court in the White case, the Court said (166 Pac., 284):

> "Thus, from the court of ultimate authority over questions affecting constitutional guaranties and rights, we find answers to all of the arguments advanced by the appellant why Chapter VI of Title 14 (the Employers' Liability Law) is in conflict with the Fourteenth Amendment of the Constitution of the United States."

The suggestion that the amount recoverable was not limited, was dismissed in a single paragraph (166 Pac., 284), not by any consideration of the Federal constitutional question, but by reference to a provision of the State Constitution, which provided that no law should be passed limiting the amount of damages recoverable for causing death or injury to any person.

Reference has already been made to the very able dissenting opinion of Ross, J. (Appendix B, *post*, p. 21), which has not yet been reported. Judge Ross, while fully recognizing the power of the State to legislate in such matters and to create a liability without fault under certain conditions, in the case of hazardous occupations, demonstrated that the legislation in question was very different from that involved in the compensation acts recently considered by this Court; and in the course of his opinion, he pointed out (*post*, p. 25) that by this legislation, "none of the evils of a difficult problem affecting one of the most important of social relations was done away with." He calls attention to the fact that this Court, in the White case, said that the Workmen's Compensation Law was a *substituted* system, to compensate employers or their dependents for injuries in certain hazardous occupations, with a definite method employed to determine the amount of the injury; and he then added (*post*, p. 26):

> "Our liability is not a substitution for former rights and remedies. It creates a new right, not to take the place of old ones but supplemental or cumulative in its nature. It leaves open to the injured employee or his personal representatives or dependents the common law action of negligence, as modified by our Constitution, and also the right to claim under the Compensation Act."

In conclusion, he characterizes the conditions in Arizona, growing out of this legislation, as "confused, chaotic and unsatisfactory;" and he strongly urges that a rational system

of compensation, "following the laws of other states," be adopted.

II. *Superior and Pittsburg Copper Co. v. Tomich.*

That was an action under the Employers' Liability Act of Arizona to recover damages for an injury to three fingers necessitating their amputation at the first joint. The plaintiff was employed in pushing a car in a mine and the injury resulted from his stumbling while so engaged. In the complaint, the defendant company was charged with negligence; but, upon the trial, the cause of action based upon negligence was expressly waived and abandoned. The jury returned a verdict for $8,000, which counsel for the appellee conceded was excessive (165 Pac., 1186). The tendency to excessive verdicts in such cases was commented on by Ross, J., in his dissenting opinion (165 Pac., 1185, 1186).

The objection that the Employers' Liability Law was unconstitutional was disposed of on the authority of the Mendez case (*supra*).

In his dissenting opinion, Ross, J., called attention to the provision in the statute, that an employer wholly free from negligence is exposed to greater liability than if he contributed to the injury, because, in the latter case, the damages are apportioned (165 Pac., 1186).

III. From the foregoing, it will be seen that in neither of the Arizona decisions was the validity of the Employers' Liability Law, under the Fourteenth Amendment, discussed or considered by the two members of the Court who rendered the decision, and that they both erroneously assumed that the decision of this Court in the White case was controlling upon them.

SIXTH.

Liability without fault.

There are certain cases in which the courts have recognized that there may be liability without fault; but they are exceptions to the general rule of liability under our law and depend on conditions which are in no way applicable to this situation. Some of them are based on the ancient insurer's liability of innkeepers and carriers, while others relate to the strict liability which has been imposed on railroads in relation to damages caused by fire or by injuries to cattle. The latter are really not cases of liability without fault, as the liability is usually imposed only where there has been a failure to comply with some reasonable requirement, such as fencing the railroad's right of way. This is simply an instance of the power of the legislature to create a new obligation, failure to observe which is a sufficient wrong to be the basis of liability.

SEVENTH.

In each case, the judgment of the Court below should be reversed, and judgment should be directed in favor of the plaintiff in error, dismissing the complaint upon the merits.

Washington, January, 1918.

JOHN A. GARVER,
ERNEST W. LEWIS,
Counsel.

Appendix A.

I. *Constitution of Arizona.*

Article XVIII of the Arizona Constitution is entitled "Labor." SECTIONS 4, 5, 6, 7 and 8 of that Article are as follows:

"SEC. 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"SEC. 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

"SEC. 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"SEC. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an *Employers' Liability Law*, by the terms of which any employer, whether individual, association or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"SEC. 8. The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the course of, such employment is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

II. *Employers' Liability Law.*

This Law was enacted by the Legislature, at its first Special Session held in 1912, shortly after the adoption of the Constitution, and now comprises Chapter VI, of Title 14 of the Revised Statutes of Arizona, 1913, entitled "Liability of employers for injuries to workmen in dangerous occupations" (Sections 3153 to 3162, inclusive).

The relevant portions of the Act are as follows:

"SEC. 3153. This chapter is and shall be declared to be an employers' liability law, as prescribed in Section 7 of Article XVIII of the State Constitution.

"SEC. 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"SEC. 3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

"SEC. 3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

"(1) The operation of steam railroads, etc.

* * * * * * *

"(8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.

* * * * * * *

"(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical

power is used to operate machinery and appliances in and about such premises.

"SEC. 3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"SEC. 3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, services and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

"SEC. 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"SEC. 3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the

plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

III. *Workmen's Compensation Law.*

This Law was also adopted at the Special Session of the Legislature in 1912, and now comprises Chapter VII of Title 14 of the Revised Statutes of Arizona, 1913, entitled "Compensation for injuries to workmen engaged in dangerous and hazardous employments" (Section 3163 to 3179, inclusive).

The relevant portions of the Chapter are as follows:

"SEC. 3163. This Chapter is a Workmen's Compulsory Compensation Law, as provided in Sec. 8 of Article XVIII of the State Constitution.

"SEC. 3164. Compulsory compensation shall be paid by his employer to any workman engaged in any employment declared and determined as in the next section hereof (as provided in Sec. 8 of Article XVIII of the State Constitution) to be especially dangerous, whether said employer be a person, firm, association, company or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused, in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents or employee or employees, to exercise due care, or to comply with any law affecting such employment.

"SEC. 3165. (This is substantially identical with Section 3156 of the Employers' Liability Law.)

"SEC. 3166. In case such employee or his personal representative shall refuse to settle for such compensation (as provided in Sec. 8 of Article XVIII of the State Constitution), and chooses to retain the right to sue said employer (as provided in any law provided for in Sec. 7, Article XVIII. of the State Constitution), he may so refuse to settle and may retain said right.

"SEC. 3167. It is hereby declared and determined to be contrary to public policy that any employer conducting any especially dangerous industry, through any of his or its officers, agents, or employee or employees, shall fail to exercise due care, or fail to comply with any law affecting such employment, in such manner as to endanger the lives and safety of employees thereof, without assuming the burden of

the financial loss through disability entailed upon such employees, or their dependents, through such failure; and it is further declared and determined to be contrary to public policy that the burden of the financial loss to employees in such dangerous employments, or to their dependents, due to injuries to such employees received through such accidents as are hereinbefore mentioned shall be borne by said employees without due compensation paid to said employees, or their dependents, by the employer conducting such employment, owing to the inability of said employees to secure employment in said employments under a free contract as to the conditions under which they will work.

"SEC. 3168. The common law doctrine of no liability without fault is hereby declared and determined to be abrogated in Arizona, as far as it shall be sought to be applied to the accidents hereinbefore mentioned.

"SEC. 3169. When, in the course of work in any of the employments described in the third section above, personal injury by accident arising out of and in the course of such labor, service, or employment, is caused to or suffered by any workman engaged therein, by any risk or failure specified in section 66 (Par. 3164) hereof, then such employer shall be liable to and must make and pay compensation to the workman injured, and his personal representative, when death ensues, for the benefit of the estate of the deceased, for such injury at the rates and in the manner hereinafter set out in this chapter;

"Provided, that the employer shall not be liable under this chapter in respect of any injury which does not disable the workman for a period of at least two weeks after the date of the accident from earning full wages at the work at which he was employed, at the time of the injury; and provided, further, that the employer shall not be liable under this chapter in case the employee refuses to settle for such compensation and retains his right to sue as provided in section 68 (Par. 3166) of this title."

The Sections following, from 3169 to 3176, prescribe the procedure for fixing the compensation.

The concluding provision of Section 3176 is as follows:

"SEC. 3176. * * * If, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively."

Appendix B.

IN THE SUPREME COURT

OF THE STATE OF ARIZONA.

INSPIRATION CONSOLIDATED COPPER COMPANY, a corporation, Appellant, vs. CEFERINO MENDEZ, Appellee.	No. 1508.

Ross, J. (Dissenting):

The majority opinion states the facts upon which this case is based. It is clear therefrom the appellant was guilty of no negligent act. Indeed, it is not suggested either by pleadings or otherwise that the accident was caused by any act of appellant. On the contrary the facts would seem to indicate a lack of caution or skill upon the part of appellee.

I agree with the majority opinion that the state is clothed with power to require the employer without fault to compensate his employee for injury or in case of his death, his dependents. This principle is too well settled to be now questioned. I am satisfied that the state legislature in the absence of constitutional limitations and directions as set forth in Section 7, Art. 18 of the State Constitution could have enacted a law providing for compensation to employees injured without fault of the employer, along the general lines of the various compensation acts of the different states of the Union. I think also that under the provisions of Sec. 7, Art. 18, it was possible to formulate a law giving compensation to the employee when injured without any fault of the employer. In other words, I am of the opinion that the mandate contained in

said section and article of the Constitution is not violative of any provision of the Constitution of the United States. My quarrel is with the legislation under that mandate and not the mandate itself.

Chapter VI, Title 14, Civil Code 1913, creates a liability without fault but adopts no system or scale of compensation. It leaves the liability to be ascertained by a jury, as under the common law action for tort. It injects incongruities as to defenses allowed the employer on account of the employee's negligence. These latter, I will not discuss here for whatever view is taken of them, they do not relieve the method of ascertaining the liability, of serious, and in my opinion, fatal constitutional objections.

In the first place, I will consider the nature of this so-called Employers' Liability Law. It is designated as such both by the Constitution and the Legislature. There is not much in the name; the true test of what the right of action is, or was intended to be, must in this case, as in all others, be ascertained from the words used to describe and define it.

The Constitution directs the Legislature to "enact an Employers' Liability Law, by the terms of which any employer * * * shall be *liable* for the death or injury caused by any accident due to a condition or conditions of such occupation, in all cases in which such death or injury of such employee shall not have been caused by negligence of the employee killed or injured" (Sec. 7, Art. 18).

The liability enjoined and contemplated is one heretofore unknown to our laws. Manifestly it is not an employers' liability law in the sense in which those terms are generally used and understood, for the reason that liability laws are based on tort. They are in fact the common law right of action for negligence, with most of the defenses heretofore allowed abrogated or greatly modified. They do not undertake to create liability without fault, as is done by our legislation.

Rounsville vs. Central R. Co., 87 N. J. L., 371; 94 Atl., 392.

Winfield vs. N. Y. Central R. Co., 216 N. Y., 264; 110 N. E., 614.

Ann. Cas., 1916, A 817 Note to *Seaboard A. L. B. Co. vs. Horton*, L. R. A., 1915, C. 54.

These cases hold that a law making the employer liable without fault creates a new right of action unknown to the common law.

The legislation is a new departure creating a new liability. It is said:

> "This legislation is wholly in derogation of the common law. It is legislation which awards compensation for the accidental industrial injuries to be added to the cost of production."
>
> *Andrejwski vs. Wolverine Coal Co.*, 182 Mich., 298; 148 N. W., 684.

The liability contemplated by our Constitution being therefore a new liability, it was within the power and province of the legislature to fix and regulate it, with no limitation on that power except the employer be given the equal protection of the law and that the method of ascertaining his liability be in accordance with due process of law.

In every other jurisdiction in this country except ours, where this new right of action has been created, the law has been called a "compensation law" and the award to the employee, or his dependents has been called "compensation." The liability or compensation is based upon the average wages and the extent of the injury suffered by the employee. It is not an action to recover "damages" as are the common law action for negligence and the action under the employer's liability law.

For some inexplainable reason the framers of our Constitution enjoined on the legislature the duty of enacting two laws for the same general purpose; namely, the creation of a liability of the employer without fault. See Secs. 7 and 8, Art. 18. The latter differs from the first principally in that it is called a "compensation law" and authorizes recovery whether the employee causes the injury or not. In both instances the employer is made liable without fault. In the one as well as the other, the liability of the employer is a new one.

Under the Compensation Act, Chapter VII, Title 14, Civil Code, the legislature provided a method of recompensing the employee for injury or death by an allowance based upon his ability as a wage earner and the extent of his injury—in that respect following the compensation laws of other states. The legislature designates the recompense for injury or death under the Employer's Liability Act as "damages for personal injuries" evidently intending thereby that the damages recovered should be ascertained and *measured by the common law* standard or by the rules governing in actions sound-

ing in tort. In the matter and quantum of evidence to establish liability thereunder, it is practically the same, if not identical, with the Workmen's Compensation Law. The pecuniary liability is, however, unlimited. It contemplates a trial by jury whose only functions, necessarily in most cases, must be the fixing by their verdict the sum to be paid by the employer.

To an injured employee, or in case of his death, there are now open to him or his personal representatives or dependents, three avenues of redress: First, the Workmen's Compensation Law; Second, the Employer's Liability Law; and Third, the Common Law Action for Damages, supplemented by what is commonly known as the Lord Campbell Act. I have indicated somewhat of the nature of the first two. The status of the third or action for negligence, as it exists in this state at present, is as follows:

The common law doctrine of fellow servant is abrogated. The defence of contributory negligence and assumption of risks are questions of fact to be at all times left to a jury, and the right of action to recover damages for injuries may not be abrogated, nor may the amount of recovery be limited by statute. Sections 4, 5 and 6, Art. 18, and Section 31, Art. 2, Constitution.

These provisions of the Constitution were evidently intended to apply only to actions of negligence, in which the measure of damages were to be according to the rules of the common law. Thus understood, the common law action for damages for personal injury is so modified or changed as really and in fact to constitute what is generally known as the employer's liability law.

That the above constitutional provisions do not apply to or affect the newly created rights of action for compensation against the employer is evident or else our Workmen's Compensation Act would be violative of the Constitution, in that it does limit the amount of recovery. For like reasons I think they do not apply to the liability created by the statute known as the Employer's Liability Act. This latter act creating new liability—one not known to the common law and in derogation thereof—it would seem that the power of the legislature to fix the measure of compensation in disregard of the common law rule is as absolute as under the compensation act.

> "The theory upon which the compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss which

must be made up or compensated in some way, that most accidents are attributable to the inherent risk of employment—that is no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than by society as a whole, that a fund should be provided by the industry from which a *fixed sum* should be set apart as every accident occurs to compensate the person injured or his dependents, for his or their loss." (Italics mine.) *State vs. Industrial Com.*, 92 Ohio St., 434, 450; 111 N. E. 299; L. R. A., 1916, D. 944.

The justification of such an economic rule and its substitution for the common law and employer's liability rule of damages for personal injury is variously stated by the courts, but all are based upon common ground: That the State owes the duty to its members of preventing their becoming public charges by reason of injuries sustained in the industries of modern civilization, the duty to stop the waste of time and money in protracted and bitterly contested law suits and thereby remove one of the most potent causes of hatred, animosity and distrust between employer and employee, the duty to prevent unjust and bogus claims supported and opposed by perjury and subornation, and to see that *bona fide* claims for compensation are amicably and expeditiously settled, the duty of relieving the state from the expense of personal injury litigation and finally to see that the injured, or his dependents, received not a moiety but all that the employer is required to pay.

Appeal of Hotel Bond Co., 89 Com., 143, 146, 93 Atl., 245; Cunningham vs. Northwestern Imp. Co., 44 Mont., 180, 204, 119 Pac., 554.

Hawkins vs. Bleakley, 220 Fed., 378, 379; Stertz vs. Industrial Ins. Co., 158 Pac., 256, 258; Lewis vs. Industrial A. C. Co. 2d., 156 Pac., 268.

The reasons given by the courts to sustain the compensation laws, it is apparent from what has been said, cannot be invoked in support of our so-called employer's liability law. None of the evils "of a difficult problem, affecting one of the most important of social relations" is done away with.

The majority opinion bases its judgment entirely upon the reasoning of the Supreme Court in *New York C. R. C. vs. White*, 243 U. S., 188, 61 L. Ed., , 37 Sup. Ct, 247, 13 N. C. C. A., 943, in which was considered the New York Workmen's Compensation Act. It is said in that case that the workmen's com-

pensation act was a *substituted system* devised to compensate employees or their dependents for injuries in certain hazardous businesses, the measure of damages being based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability and in case of death, benefits according to the dependency of the surviving wife, husband or infant child. Our liability act is *not a substitution* for former rights and remedies. It creates a new right, not to take the place of old ones, but supplemental or cumulative in its nature. It leaves open to the injured employee or his personal representatives or dependents the common law action of negligence as modified by our Constitution, as also the right to claim under the Compensation act.

Justice PITNEY, in the White case, said that as between the employer and the employee, the common law defenses of the negligence of a co-employee, assumed risk and contributory negligence could be completely abolished without violating any fundamental right of the employer or the law of the land. He cites in support thereof a number of cases upholding the state and federal departures from the common law rules of liability of the employer, but he says, at page 258:

> "It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty, of 'due process of law', suddenly set aside all common law rules respecting liability as between employer and employee, without providing a *reasonable substitute.* Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, *without setting up something adequate in their stead.* No such question is here presented, and we intimate no opinion upon it." (Italics mine.)

There is an intimation here that even the common law defenses of negligence of a fellow servant, assumed risk and contributory

negligence may not be arbitrarily abolished without substituting in place thereof some rule or system benefiting the conditions and situation, and when it is considered, that the act we now have in hand, is not substitutional—that it does not "set aside one body of rules only to establish another system in its place," but that it is purely and simply cumulative, affording an additional, new and heretofore unknown right of action with practically all defenses of the employer abrogated, I think it is quite the supposititious case alluded to by Justice PITNEY. This legislation has not attempted to "abolish all rights of action" but has created a new and additional right of action allowing no defense thereto except that it appear that the accident inflicting the injury was caused by the negligence of the employee. To say as the majority opinion does, that the negligence that will defeat a recovery by the employee, may be one of assumption or contribution is a violation and repudiation of the very definition of the right of action as defined. It certainly does not mean the negligence of working in a dangerous or hazardous place, or with careless, unskilled or incompetent co-employees. Neither does it mean contributory negligence, for in that case the injury would be caused by the combined negligence of the employer and employee and not "by the negligence of the employee killed or injured." It means a negligence by the employee at the instant of the injury or death and without which there would have been no accident. It must mean some intentional or culpable act or omission. But whatever view may be taken of that, the employer is denied the right to defend by showing that the accident was through no fault of his, and an employee whose negligence caused the injury may fall back on the Workmen's Compensation Act. If it is "due to a condition or conditions of the occupation" he may sue under the Employer's Liability Act.

In the White Case it was decided that the state was competent to set aside one body of rules and to establish another system in its place. There the common law rules governing the liability of the employer to the employee were abrogated and in lieu thereof a system of compensation substituted. Of the substituted system it was said:

> "Of course, we cannot ignore the question whether the new arrangement is *arbitrary* and *unreasonable*, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employ-

ment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and, of necessity, bearing the entire losses. * * *

"It is plain that, on grounds of natural justice, it is not *unreasonable* for the state, while relieving the employer from responsibility for *damages measured by common-law standards* and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a *reasonable amount*, and *according to a reasonable* and *definite scale*, by *way* of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed *arbitrary* and *unreasonable* from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and *substitute* a *system* under which, in all ordinary cases of accidental injury, he is sure of a *definite* and *easily ascertained compensation*, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale. * * *

"In excluding the question of fault as a cause of injury, the act in effect disregards the proximate cause and looks to one more remote,—the primary cause, as it may be deemed,—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as co-adventurers, with personal injury to the employee as a probable and foreseen result. * * *

"Viewing the entire matter, it cannot be pronounced *arbitrary* and *unreasonable* for the state to impose upon the employer the absolute duty of making a *moderate* and *definite compensation* in money to every disabled employee, or, in case of his death, those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

"This, of course, is not to say that *any scale of compensation*, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism

> is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises." (Italics mine.)

Our liability law does not relieve "the employer from responsibility for damages measured by common law standards." It does not "require him to contribute a reasonable amount, according to a reasonable and definite scale, by way of compensation for loss and earning power." It is not a substituted system assuring the employee "a definite and easily ascertained compensation," and he is not required to assume "any loss beyond the prescribed scale." It violates the recognized power of "the state to impose upon the employer the absolute duty of making a *moderate* and *definite compensation* in money in every disabled employee * * * in lieu of the common law liability confined to cases of negligence," by permitting a recovery of an unlimited amount not for disability alone, as in the White case, but for physical suffering also. It is not a composition of losses sustained in a mutual joint adventure (as Justice PITNEY reasons) in which accidental injury is inevitable and is expected, but it places all of the loss without limitation upon one of the "co-adventurers." There is in it no conception of having the employer and employee share in some measure or at all, the loss incidental to personal injuries, a basic consideration for upholding the New York Compensation Law.

It is said if the "scale of compensation" be too small or too large, it would not be "supportable." We have no scale of compensation. It is without limit. It may be ever so "insignificant, on the one hand, or onerous, on the other." Notwithstanding no criticism of the compensation prescribed by the New York statute had been made, the Supreme Court laid much stress upon the necessity of the compensation being definite and reasonable and according to a fixed scale. When that is found in the law, it is said the arrangement is not arbitrary and unreasonable from the standpoint of natural justice. A very different case in fact and in reason from the one at bar. Ours is not a system, but a law suit. When an accident happens, instead of adjustment "according to a reasonable and definite scale", both sides prepare for a contest in the courts with all the attendant evils of the old system. When the litigation is finally ended and the fruits thereof, if successful, are paid

over to the employee, whether inadequate, or excessively large, both he and the employer have been wronged, in that a goodly portion of the recovery has been diverted from the beneficiary into various channels—such as attorney's fees, costs and expenses—all necessary under the system.

Natural justice would dictate that nothing should be taken from the employee, nor would it tolerate the dissipation of the employer's property as an unction to third or foreign parties. Natural justice would require that the amount to be paid by the employer and received by the employee should be reasonable according to a definite scale and should pass unimpaired and undiminished to the beneficiary.

The right of the state to require the employer without fault to compensate the employee or his dependents, when injured in the service of the employer, is referable to the police power. As so many of the courts have said, this power is not capable of exact definition. It is recognized as the right a state has to enact laws for its preservation and betterment. It is elastic in that it expends with social and industrial necessities of the state and may be invoked to promote the health, safety and general welfare of the people. But there is a limit to its exercise. It may not be arbitrarily and capriciously exercised to deprive the citizen either of his property or liberty especially in a case of this kind where there is accruing benefit to neither the individual nor society as a whole. The Supreme Court in the White case has pointed out in no uncertain manner how "a just settlement of a difficult problem, affecting one of the most important of social relations" may be solved, and that solution has not been followed or observed in the least by our legislation.

See also:

Mountain Timber Co. vs. Washington, 243 U. S., 219, 61 L. Ed., , 37 Sup. Ct., 260, 13 N. N. C. A., 927.

Hawkins vs. Bleakley, 243 U. S., 210, 61 L. Ed., 37 Sup. Ct., 255.

In the last case cited, it was contended by the Appellant-employer that the Iowa Compensation Act did not conform to "due process of law" in that it provided that if the employer rejected the act it should be presumed, in an action for damages by the employee, that the injury was the direct result of the employer's negligence. The contention was held unsound as it only cast the

burden of proof upon the employer to rebut the presumption of fact and the court said :

> " A provision of this nature, not unreasonable in itself and not *conclusive* of the *rights* of the parties, does not constitute a denial of due process of law," citing Mobile, Jackson and Kansas City R. R. Co. v. Turnipseed, 219 U. S., 35, 31 Sup. Ct., 136, Ann. Cas., 1912, A., 463. In this last case Justice LURTON said : " * * * it must not under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defence to the main facts thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, on either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defence all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

Thus while it was held the state may change the rules of evidence so as to cast the burden of proof in the first instant upon the employer, it may not take from him all his defenses in actions for damages for personal injury. What may not be done " under the guise " of a rule of evidence surely cannot be accomplished by a direct thrust of the legislature. In both the Hawkins and Turnipseed cases the court was considering actions for damages for personal injuries where the measure of damages was according to the standards of the common law, and for that reason the rules announced in those cases is the rule that should be applied in the case at bar.

Again in the Hawkins case, speaking of the power of the state to abolish the common law defenses of fellow servant, contributory negligence and assumed risk and authorizing a recovery as " for personal injury " when the employer rejects the compensation act or when both the employer and employee rejects it, but reserving unimpaired all these defenses in case the employer accepts and the employee rejects the act, the court said :

> " We cannot say that there is here an arbitrary classification within the inhibition of the equal protection clause of the Fourteenth amendment. * * * As already shown, the abolition of such defenses is within the power of the State, and the legislation cannot be condemned when that power has been *qualifiedly exercised* without unreasonable discrimination."

Our liability law not only abolishes the defenses named in a case of the kind we have here, but takes from the employer the right to defend by showing that he was guilty of no fault. The legislation is all in favor of the employee. The employer is given no chance to escape the unlimited liability imposed. The Iowa statute under consideration in the Hawkins case gave the employer the alternative of paying a reasonable compensation according to a definite scale, refusing which, his only defense was to show that he was guilty of no negligence. Our liability offers no alternative, neither can the employer defend by showing he was without fault. Granting that the employer may defend by showing that the employee contributed to the accident or that he assumed risks not inherent in the occupation, an absurdity, it seems to me, still he is deprived of the fundamental right of showing he was without fault, and at the same time made liable for unlimited damages, as in a suit for personal injury according to the standards of the common law—and the law has provided no avenue of escape for him. This, it would seem, is "unreasonable discrimination" against the employer and in favor of the employee. That all defenses may be abolished and absolute liability imposed without fault, according to a reasonable and definite scale is not questioned, but it is inconceivable that one who is guilty of no wrong should be made liable to an injured employee in damages unlimited and unlimitable.

I am constrained to hold that the so-called Employers' Liability Act, in so far as the procedure for the enforcement of the right of action created thereunder is concerned, is not a proper and lawful exercise of the police power of the State, and further that it denies the employer due process of law in that it deprives him of the right to present all his defenses, at the same time allowing unlimited damages against him according to the standard of damages at common law.

At the expense of extending this opinion—too long already—I wish to add: The right of action created by the act is not limited to the employee, or, in case of death, to his dependents. It extends to the parents, whether dependent or not, and the personal representative for the benefit of the estate, in the absence of certain enumerated classes. Thus an employer without fault may be mulcted in damages to an estate which would go to the heirs in no way dependent upon the deceased or, there being no heirs, it would escheat. This I conceive to be contrary to every dictate of natural

justice. All employers in the occupations mentioned are not millionaires—some are just beginning, with no more means than the men they employ. It reaches the small contractor and small mine owner as well as the larger concerns of the State. Yet these, under the law, guilty of nothing other than a laudable ambition to better their condition, and incidentally build up and develop the industries of the state, may be forced to contribute to an estate that owes nothing or that may go to heirs in no way dependent on the deceased, or that may be escheated.

The workmen's compensation laws of the different states and foreign countries without exception, so far as I know, limit the benefits to the employee, or in case he dies, to his *dependents.*

In view of the fact that our Workmen's Compensation Act is not satisfactory to either employer or employee and our Employer's Liability Act, as drawn, is clearly unconstitutional, as I see it, I feel constrained to express my opinion more at length than I otherwise would.

The Workmen's Compensation Act is generally conceded to give inadequate compensation for death and injury. It is compulsory on the employer only. The employee's option to accept under it can be exercised after the injury. *Consolidated Arizona Smelting Co. vs. Ujack,* 15 Ariz., 382, 139 Pac., 465, and is personal to the employee. The beneficiaries of the deceased cannot exercise the option at all or in any case. *Behringer vs Inspiration Consolidated Copper Company,* 17 Arizona, 232, 149 Pac., 1065 It therefore is not a " just settlement " of the rights and wrongs growing out of the relation of employer and employee. This confused, chaotic and unsatisfactory condition has had the attention of both employer and employee with a view of remedying it, but owing to a lack of co-operation by the last legislature with a joint committee representing both sides, nothing was accomplished. It is devoutly to be wished that a just, reasonable and equitable law following the lines of other states, settling the question, may soon find a place in this state.

HENRY D. ROSS,
Judge.